Mandated Predictability Jeopardizes Workplace Flexibility

Predictable scheduling has become a national issue for labor groups over the last several years. Labor has focused on five areas: 1) lack of adequate notice of work schedules—“just-in-time scheduling”; 2) “clopening,” which is working a closing shift and an opening shift back-to-back; 3) on-call shifts; 4) last-minute requests to work a shift or last-minute cancellation of shifts; and 5) guaranteed hours, or a lack thereof. Proponents of predictable scheduling have stated that these issues have an impact on low-wage workers and part-time employees who try to work multiple jobs, as well as women who struggle with child care.

Opponents argue that mandating scheduling requirements will limit an employer’s flexibility to accommodate employee requests for time off, limit offers of additional hours for employees who seek or want to work more, and significantly increase the cost of doing business.

This national debate between predictability versus flexibility will continue to be a policy consideration in California in 2016.

Predictability vs. Flexibility

Scheduling Concerns

A policy brief highlighting concerns with lack of predictable schedules was published by the Center for Law and Social Policy, Retail Action Project, and Women Employed. The brief, “Tackling Unstable and Unpredictable Work Schedules,” argues that low-wage workers are “disproportionately affect[ed]” by “just-in-time scheduling” that contributes to income instability and threatens their eligibility for government income support and benefits.

The brief also states that lack of control over schedules and hours creates stress, marital strife and challenges with day care as well as transportation. The authors claim employers are responsible for this instability through the increased use of scheduling software that allows employers to “manipulate workers’ schedules in response to changes in demand,” with little notice to the employee.

The policy brief offers several recommendations, including: 1) guaranteed minimum hour policies; 2) reporting time pay; 3) advance notification of schedules; and 4) laws that make union organizing easier.

Notably, California is one of nine states that already have a reporting time pay law, as discussed below, in which an employee is compensated a minimum amount for simply showing up to the scheduled shift.

Another study conducted by Susan J. Lambert and Julia R. Henly, published by the University of Chicago, documented the various challenges managers face when producing schedules (“Work Scheduling Study: Managers’ Strategies for Balancing Business Requirements with Employee Needs”). The study surveyed managers of 139 retail stores and highlighted the struggle of scheduling hours within the labor goals and limitations set by the company, while still providing employees with enough hours of work as well as the shifts they prefer.

The study indicated that obtaining a sufficient number of hours was employees’ main priority as opposed to advance notice of schedules. Although one-third of the managers surveyed provided two-weeks of notice of employee schedules, the majority provided approximately four days’ notice. More than 53% of the managers reported that, once posted, changes to the schedule are common. “[N]ot every life circumstance can be anticipated,” thereby leading to numerous employee-initiated changes to the schedule once posted.

Flexibility

Workplace flexibility also is a significant factor for employees. The need for and importance of flexibility in the workplace was emphasized in the Executive Summary published by President Barack Obama in March 2010, “Work-Life Balance and the Economics of Workplace Flexibility.” One of the issues raised in this summary was the ability of employees to have input on their schedule. The summary focused on businesses that allow employees the ability to change their start and end times on shifts periodically, even on a daily basis, as a positive attribute of flexibility.

Additionally, the CitiSales Study, conducted by Jennifer E. Swanberg, JacQuelyn B. James, Mac Werner, et al. with the University of Kentucky Institute of Workplace Innovation and Boston College’s Center for Work and Family in 2008, interviewed more than 6,000 hourly employees and senior management in 388 stores across the country. The intent of the study was “to examine the employee and organizational benefits associated with a work environment that is responsive to the needs of workers employed in lower-wage hourly jobs.” The study found “that six workplace dimensions are critical components of employee engagement and customer satisfaction in the retail industry.” The dimensions are 1) effective supervisors; 2) job fit and adequate resources; 3) opportunities for career development; 4) teamwork; 5) schedule satisfaction; and (6) schedule flexibility.

With regard to schedule flexibility, the study found that flexibility optimizes recruitment of quality employees, boosts retention, promotes productivity, engages employees, reduces turnover, and creates quality customer service. The study noted that the two largest burdens with providing flexibility, however, were accommodating employee scheduling requests while still meeting the business demands. The study quoted one manager regarding employee requests: “There is only so much time that you can spend constantly changing the schedule before you have to just make it what it should be.”

To ensure flexibility and schedule satisfaction, the CitiSales Study promoted the following six practices for workplace flexibility: 1) allow employees to provide input on their schedule preferences such as days, shifts, or hours of work; 2) opportunity
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employees hours that would force the employer to pay overtime; a calendar year; whether an employer has to offer part-time to determine the number of employees an employer has in regulations. Issues focused on in the regulations included how and County of San Francisco promulgated implementation the Office of Labor Standards Enforcement for the City Ed Lee. The ordinance went into effect in July 2015. of Supervisors in November 2014, but was not signed by Mayor Formula Retail Worker Bill of Rights was passed by the Board part-time employees before hiring additional employees. The same paid and unpaid time off for part-time and full-time full-time and part-time employees who perform the same duties; with fewer than seven days notice; same hourly rate of pay for imposed against the employer for changes made to the schedule as proposed financial penalties associated with schedule changes as proposed financial penalties associated with changes made to the schedule, penalties for offering part-time employees additional hours or reducing hours triggers an obligation to pay penalties, which employers are not willing to absorb; • Employees do not always know their availability to provide input for a two-week schedule and are frustrated with the hours and days of work they ultimately are provided; • Part-time employees who want additional hours of work, even last-minute offers, are not getting those hours because employers are concerned they will be exposed to financial penalties for offering those hours of work; • Employee requests for schedule changes after the schedule is posted cannot be accommodated as employers are not willing to expose themselves to financial penalties for making these accommodations. Employees are frustrated with the lack of flexibility.

San Francisco Ordinance
In November 2014, San Francisco passed two ordinances referred to as the “Formula Retail Worker Bill of Rights,” which included multiple provisions on applicable hours, schedules and worker benefits at large retailers. A formula retail company is defined in the city ordinance as any retail employer with 20 or more employees, at least 11 locations anywhere in the world, and a standardized array of merchandise, facade, decor and color scheme, uniform apparel, signage, trademark or a service mark. Such employers include, but are not limited to, restaurants, banks, retail stores, and movie theaters.

Provisions in the Formula Retail Worker Bill of Rights are a 14-day notice of employees’ schedules with financial penalties imposed against the employer for changes made to the schedule with fewer than seven days notice; same hourly rate of pay for full-time and part-time employees who perform the same duties; same paid and unpaid time off for part-time and full-time employees; and written offer of additional hours of work to part-time employees before hiring additional employees. The Formula Retail Worker Bill of Rights was passed by the Board of Supervisors in November 2014, but was not signed by Mayor Ed Lee. The ordinance went into effect in July 2015.

Before the effective date of the formula retail bill of rights, the Office of Labor Standards Enforcement for the City and County of San Francisco promulgated implementation regulations. Issues focused on in the regulations included how to determine the number of employees an employer has in a calendar year; whether an employer has to offer part-time employees hours that would force the employer to pay overtime; what employer conduct triggers an obligation to pay penalties for schedule changes, such as inviting, soliciting or suggesting that the employee can change his/her schedule; and how to reconcile predictability penalty pay with California’s reporting time pay.

Although the Formula Retail Worker Bill of Rights has been in effect only for several months, employers and employees are already feeling the impact. Feedback from several employers on the ordinances is as follows:

- Employers are unable to adjust to staffing needs based upon changes to consumer demand as offering part-time employees additional hours or reducing hours triggers an obligation to pay penalties, which employers are not willing to absorb;
- Employees do not always know their availability to provide input for a two-week schedule and are frustrated with the hours and days of work they ultimately are provided;
- Part-time employees who want additional hours of work, even last-minute offers, are not getting those hours because employers are concerned they will be exposed to financial penalties for offering those hours of work;
- Employee requests for schedule changes after the schedule is posted cannot be accommodated as employers are not willing to expose themselves to financial penalties for making these accommodations. Employees are frustrated with the lack of flexibility.

State Legislation: AB 357
Assemblymember David Chiu (D-San Francisco) was elected to the Assembly in 2015. He was previously a member of the San Francisco Board of Supervisors, and one of the authors of the Formula Retail Worker Bill of Rights. Assemblymember Chiu introduced AB 357, which mirrored provisions of the Formula Retail Worker Bill of Rights.

Specifically, AB 357 mandated a two-week notice of an employee schedule, financial penalties associated with changes made within seven days before the scheduled shift, penalties for on-call shifts, exposure to civil litigation, and a protected leave of absence for an employee to attend appointments with the county human services agency for government assistance. The bill was sponsored by United Food and Commercial Workers and supported by numerous labor organizations as well as plaintiff’s attorneys.

Proponents argued that the legislation was important to assist low-wage workers, who have two jobs and need predictability of their schedule. AB 357 was widely opposed by numerous business-related organizations and labeled a job killer by the California Chamber of Commerce. Opponents argued that the financial penalties associated with schedule changes as proposed by AB 357 would eliminate employers’ willingness to accommodate last-minute employee requests for schedule changes.

The bill moved through the Assembly committees, but was never taken up for a vote on the Assembly Floor. As of the date
of this publication, AB 357 was on the Inactive File on the Assembly Floor and eligible for consideration by the Assembly before January 31, 2016.

**Activity Across the Nation**
To date, San Francisco is the only locality that has enacted an ordinance regarding predictable scheduling. Several cities throughout the country are considering local ordinances, including Albuquerque, New Mexico; Chicago, Illinois; Washington D.C.; and Minneapolis, Minnesota.

Several other states have introduced legislation similar to AB 357; however, none have been enacted. These states include Connecticut, Illinois, Indiana, Maryland, Massachusetts, Minnesota, Oregon, New York, and Maine. In 2015, Michigan passed a law (HB 4052) that pre-empts any local jurisdiction in the state from enacting an ordinance imposing mandates on employers to pay higher wages or benefits to employees or provide leave other than those required by state law.

**Existing California Law**
Although California does not have a law that specifies the required time in which to post an employee’s work schedule, it has several laws that regulate the hours and days of work for an employee, as follows:

- **Reporting Time Pay:** California law requires an employer to provide employees with at least partial compensation when they report to work but are sent home by the employer for some reason such as lack of work/customer demand, improper scheduling, or lack of notice. The Industrial Welfare Commission wage orders require that employers pay nonexempt employees “half the usual or scheduled day’s work, but in no event for less than two hours nor more than four hours, at his or her regular rate of pay.” So, if an employee is scheduled to work 8 hours, but is sent home after 1 hour, the employer must pay the employee 4 hours of reporting time pay.

  In *Aleman v. Airtouch Cellular*, 209 Cal.App.4th 556 (2012), the court clarified this requirement to specify that an employer is required to pay reporting time pay only when the employee works for less than half of the scheduled shift. In *Aleman*, the employee was scheduled for only a 1-hour-and-30-minute meeting, which ended early and lasted only an hour. The employer paid the employee for an hour and the employee sued the employer, claiming he should have received the minimum 2 hours of compensation for reporting time pay. The court disagreed and stated that reporting time pay requires an employer to pay the minimum 2 hours of pay only when an employee has worked less than half of the scheduled shift. In *Aleman*, the scheduled shift was 1 hour and 30 minutes, and the employee worked over half of the shift, for which he was paid. Accordingly, the employer was not required to pay reporting time pay.

- **Split Shift Pay:** California also requires employers that have employees work two separate shifts in a day which are separated by a break longer than 1 hour to provide split-shift pay. The employer must pay the employee an extra hour of pay at minimum wage, unless the employee earns an hourly wage wherein the total amount earned for all hours worked is greater than the minimum wage for all hours worked, including the extra hour of pay. See *Aleman*, 209 Cal.App. at 574-575.

- **Daily and Weekly Overtime:** California is one of only three states in the country that requires employers to pay employees both daily and weekly overtime. Specifically, Labor Code Section 510 requires an employer to pay 1.5 times the employee’s regular rate of pay for hours worked over 8, but under 12, and double the regular rate of pay for hours worked over 12 in a workday. California also requires 1.5 times the regular rate of pay for all hours worked over 40 in a workweek.

- **One Day of Rest:** Labor Code Section 552 mandates employers to provide employees one day of rest in a workweek. Labor Code Section 510 specifies that any work in excess of 8 hours on any seventh day worked in a workweek shall be paid at twice the employee’s regular pay.

**CalChamber Position**
Legislation that seeks to micromanage a private employer’s business, such as mandating when schedules must be posted, what changes to the schedule an employer may make, when an employer can make schedule changes, or guaranteeing minimum hours of work, will have negative consequences for the business as well as its employees.

Government is not in a better position to determine how to manage a workforce effectively, especially in various industries where customer demand, location, employee needs and business needs are constantly changing. Strict statutory standards that seek to regulate such issues with the threat of financial penalties and litigation will ultimately force businesses into rigidity with regard to employee requests for schedule accommodations, other workplace flexibility, or even the number of full-time versus part-time employees they hire.

These unintended, but likely consequences should prompt the Legislature to pause before seeking to impose such broad and onerous laws on California employers.

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